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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 LOCALS 302 AND 612 OF THE  
8 INTERNATIONAL UNION OF  
9 OPERATING ENGINEERS  
CONSTRUCTION INDUSTRY HEALTH  
AND SECURITY FUND, *et al.*,

10 Plaintiffs,

11 v.

12 ACE PAVING CO., INC.,

13 Defendant.

Case No. C11-1257RSL

ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT

14 This matter comes before the Court on Plaintiffs' unopposed motion for summary  
15 judgment (Dkt. # 4). Plaintiffs ask the Court to conclude that no genuine issue of  
16 material fact exists and award them actual and liquidated damages, as well as interest,  
17 costs, and fees. The Court GRANTS the motion.

18 **I. BACKGROUND**

19 Plaintiffs are unincorporated associations operating as Trust Funds pursuant to  
20 section 302 of ERISA. They filed the instant suit seeking to collect delinquent trust  
21 funds and union dues.

22 In support of their motion for summary judgment, they present the Court with the  
23 remittance documents they received from Defendant for the months of June 2011  
24 through October 2011. These documents reflect that Defendant itself determined that it  
25 owed Plaintiffs \$310,893.17 in outstanding trust contributions and \$21,163.32 in

1 outstanding union dues and union program payments. They also provide the Court with  
2 each of the trusts' agreements with Defendant, pursuant to which Plaintiffs request  
3 interest damages (calculated at \$7,969.06 through December 7, 2011), \$37,307.18 in  
4 liquidated damages, and attorney's fees and costs.

## 5 **II. DISCUSSION**

6 The Court may enter judgment as a matter of law only if it is satisfied that there is  
7 no genuine issue of material fact to preclude judgment as a matter of law. Fed. R. Civ.  
8 P. 56(c). As the moving party, Plaintiffs bear the initial burden of informing the Court  
9 of the basis for summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).  
10 They must prove each and every element of its claims or defenses such that no  
11 reasonable jury could find otherwise. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
12 248 (1986). In doing so, they are entitled to rely on nothing more than the pleading  
13 themselves. Celotex, 477 U.S. at 322–24. Only if Plaintiffs make that initial showing  
14 does the burden shift to Defendant to show by affidavits, depositions, answers to  
15 interrogatories, admissions, or other evidence that summary judgment is not warranted  
16 because a genuine issue of material fact exists. Id. at 324.

17 Notably, only those factual disputes whose resolution would affect the outcome  
18 of the suit are material. Anderson, 477 U.S. at 248. A genuine issue exists only if the  
19 evidence is such that a reasonable trier of fact could resolve the dispute in favor of the  
20 nonmoving party. Id. at 249. “If the evidence is merely colorable . . . or is not  
21 significantly probative . . . summary judgment may be granted.” Id. at 249–50. In  
22 reviewing the evidence “the court must draw all reasonable inferences in favor of the  
23 nonmoving party, and it may not make credibility determinations or weigh the  
24 evidence.” Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150 (2000).

25 Turning to the facts of the present case, the Court finds that there is no genuine  
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1 issue of material fact. Defendant has not opposed Plaintiffs' motion.<sup>1</sup> Accordingly,  
2 pursuant to Local Civil Rule 7(b)(2), the Court presumes that Defendant concedes that  
3 the motion has merit. Moreover, Defendant has not introduced any evidence in this  
4 case. Thus, as a practical matter, the Court is left only with Plaintiffs' evidence, which  
5 clearly demonstrates entitlement to relief.

6 Both the provided trust agreements with Defendant (e.g., Dkt. # 7-1 at 25–26 §§  
7 1–3; id. at 29 § 9) and Defendant's own remittance reports (Dkt. # 9-4 at 25–59)  
8 demonstrate that Defendant was obligated to pay Plaintiffs contributions and dues. And  
9 Defendant's own reports demonstrate exactly how much was owed under that  
10 obligation: \$310,893.17 in trust contributions and \$21,163.32 in union dues and union  
11 program payments. Dkt. # 9-4 at 25–59. Finally, the only evidence in this case  
12 regarding payment is the declaration of Richard Kafer, the president of the corporation  
13 that administers the trusts. He declares under penalty of perjury that Defendant has yet  
14 to pay the amounts claimed. Dkt. # 9 at ¶¶ 18–19, 24–25. Accordingly, the Court  
awards Plaintiffs the requested amounts.

15 In addition, the agreements in this case each provide that Plaintiffs are entitled to  
16 interest in an amount of 12% per annum and a 12% liquidated damages charge on all  
17 delinquent contributions, as well as reasonable attorney's fees and costs. Dkt. # 9-2 at  
18 29–30 § 9. ERISA requires this Court to award Plaintiffs these amounts.<sup>2</sup> 29 U.S.C.A.  
19 § 1132(g)(2). Accordingly, the Court awards Plaintiffs \$37,307.18 in liquidated

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20 <sup>1</sup> The Court is concerned by the failure of Defendant's counsel's to file an answer with  
21 the Court or otherwise appear on behalf of his client's interests in this matter. More concerning  
22 is the fact that it appears this is not an isolated occurrence. See Nw. Adm'rs Inc. v. Ace Paving  
23 Co., Inc., Case No. 2:10-cv-01069-JPD (W.D. Wash.) (reflecting that counsel for Defendant,  
24 Joel C. Merkel, failed to file an answer or otherwise appear before default was entered because  
of "inadvertence and mistake" (Dkt. # 7); failed to timely respond to a summary judgment  
25 motion (Dkt. # 20); and ultimately had his appeal dismissed for failure to file an opening brief  
(Dkt. # 33)).

26 <sup>2</sup> ERISA appears to preempt Washington's law precluding the imposition of liquidated  
damages. 29 U.S.C.A. § 1144(a)–(b).

1 damages, as well as interest, attorney's fees, and costs. The Court DIRECTS Plaintiffs  
2 to file within seven days of the date of this Order a supplemental memorandum that  
3 contains an up-to-date accounting of the accrued interest, fees, and costs as of the date  
4 of this Order.

### 5 **III. CONCLUSION**

6 For all of the foregoing reasons, the Court GRANTS Plaintiffs' motion and  
7 DIRECTS Plaintiff to file within seven days of the date of this Order a supplemental  
8 memorandum that sets forth the amount of interest, fees, and costs currently owed.

9 DATED this 18th day of April, 2012.

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12 Robert S. Lasnik  
13 United States District Judge  
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